burden of proof, for this reason, as a matter of law, is always, upon such proof, changed. It may well be said that the non-contradiction of the evidence of possession or the want of an explanation of how the accused became possessed of the property, tends to decrease the probabilities of his innocence and that in proportion to increase or strengthen the evidence of his guilt, but unless the prosecution by the evidence it has produced has shown beyond reasonable doubt that the prisoner is guilty, the burden of proof is not thrown upon him to prove that he is innocent. This is probably what is meant by the writers who assert in the technical language of the criminal courts, that the burden of proof is changed upon proof of exclusive and recent possession of the stolen property. The rule that "*Ei incumbit probatio qui dicit, non qui negat*" is too well established to be the subject of controversy.

It may therefore be said, in conclusion, that unless the recent exclusive possession proved is, under the circumstances, enough to show the prisoner guilty beyond all reasonable doubt the burden of proof is not thrown upon him.

CHARLES BIDDLE.

Philadelphia.

Supreme Court of Tennessee.

WHITMORE *v.* BALL.

On a motion for a new trial affidavits of jurors are admissible, even in a civil case, to show the misconduct of the jury after retiring, so as to vitiate the verdict.

If the jurors decline on the application of a party to give an affidavit of the facts, the trial-judge should, on motion of such party, call the jurors before him by process and examine them in open court touching the alleged misconduct.

If he has refused so to do, the Supreme Court will, where the affidavit of the applicant party showed an admission of misconduct by jurors, and the same was not denied by the opposite party nor contradicted by the jurors, award a new trial.

THIS was an action for libel in which, after verdict, the defendant moved for a new trial and read his own affidavit stating his grounds as follows: That A. M. Stoddard, one of the jury, after the jury had retired for consultation, stated to it that to his knowledge W. S. Trask, who wrote the article in the "Ledger," about which this controversy is, had prejudice and malice against the plaintiff, because when plaintiff had charge of the European Hotel, he had refused to give Trask free dinners or free meals, or free board at his house; that the "Public Ledger," which published the article complained of, and of which Whitmore is the owner, had published other articles defamatory of individuals, and that he wanted to stop it; that said Whitmore had published unjust and false articles about a society of which he (the juror) was a member, and that he had not forgotten it, and that he wanted to punish Whitmore for

these things. He further said that the witnesses who had given damaging testimony as to the character of the plaintiff and of the hotel he kept, he did not believe; that he had lived at the hotel and knew better, &c.

The affidavit further stated that such statements made in the jury room were calculated to mislead and prejudice the jury, and affiant believed did have an important effect and influence on the jury in inducing it to yield to Stoddard's suggestions and give a verdict for damages; that without them, he believed the verdict would have been for him, or at least for merely nominal damages.

The affidavit disclosed the names of three jurors, from whom the facts of Stoddard's conduct had been learned, but who refused to voluntarily give their affidavits, but said they would make the statements if called by the court or as the court might order. The court below refused to permit counsel to examine the said jurors in open court, as requested, holding it improper to do so in the absence of affidavits from the jurors themselves, and informed defendant's counsel that the court would wait for an affidavit from a juror and would consider it if presented. The court was then requested to examine the jurors or any of them touching the evidence of Stoddard in the jury room. This was refused, the court holding it to be improper in the absence of affidavits of some of the jurors themselves.

Judgment being entered on the verdict defendant took this writ of error.

The opinion of the court was delivered by

TURNEY, J.—That a verdict may be attacked and set aside for the misconduct of a juror, established by the testimony of his fellows, is too well established in this state to be disturbed now.

We know of no reason in public policy why it should be otherwise. It certainly has a controlling tendency to insure purity and fairness in jury trials. The statements of Stoddard as discovered in the affidavit were calculated to, and no doubt did, prejudice the jury and incline its minds to a verdict against the plaintiff in error.

Treating the affidavit as *prima facie* true, it is certain that Stoddard was the friend and advocate of the defendant in error, and that a fair and impartial trial could not be had at his hands.

A strong presumption arises, that his conduct in the jury room brought about the verdict.

This court has several times said, the better practice is, to examine the juror in open court. Such course gives the adverse side full opportunity to test the witness and place before the court the facts in their true light. No room is left for sliding over or concealing facts, which, if left out of an affidavit, put on the matter a face wholly different from the truth. In this case the accusing jurors had refused to make written affidavits, and we know of no rule by which court or counsel could have compelled them to it.

It was in the power of the court to have compelled them to answer questions.

In this case it appears that the affidavit had been filed long enough to give the plaintiff and counsel ample time to examine it and prepare to defend against it before the action of the court was invoked on inquiring into the conduct of the offending juror. This fact excites a decidedly strong suspicion that the facts charged could not be rebutted and we will look to it as a circumstance in the nature of a confession on the part of the plaintiff below of the truth of the charges. Under all the circumstances we are of opinion the court should have examined the jurors offered, or a sufficient number of them, some of whom were present under subpoena, to have shown the truth or falsehood of the facts charged and their influence upon the jury in arriving at its verdict. It was in the legitimate power of the court to have compelled the attendance and deposition of each juror while counsel and parties were powerless to compel written affidavits.

Reversed.

COOPER, J., dissented.

The doctrine and practice of courts in Tennessee in regard to the admissibility of evidence by jurors to vitiate their own verdicts is peculiar. In accord with the English and Federal cases it is held here, as in the other states, that, on a motion for a new trial, the court will not hear the affidavits of jurors to impeach their verdicts, because they had misunderstood or disregarded the charge of the court, or had misconceived or mistaken the evidence in the case: *Norris* v. *State*, 3 Hun 333; *Saunder* v. *Fuller*, 4 Id. 516; *Wade* v. *Ordway*, 1 Baxter 229; *Dunnaway* v. *Sharon*, 3 Id. 206; *Richardson* v. *McLemore*, 5 Id. 586; *Roller* v. *Bachman*, 5 Lea 153; the same rule prevailing uniformly in civil and criminal trials. But, contrary to the present practice in England, and in the other states, save Ohio perhaps, the affidavit of jurors will be received to show their misconduct, such as receiving evidence *ex parte*, or holding private consultation with either party to the suit after retiring, or resorting to chance to reach a verdict. This course pursues the ancient practice prevailing in England

down to the time of Lord MANSFIELD, who changed the practice there in 1770.

As late as 1851 there seems to have been no established rule as to the admission or rejection of such affidavits in the federal courts. TANEY, C. J., then said: "It would, perhaps, be hardly safe to lay down any general rule on this subject. Unquestionably such evidence ought to be received with great caution:" *United States* v. *Reid*, 12 How. 361; since which no ruling seems to have been made in the Supreme Court upon the practice. In *Ladd* v. *Wilson*, 12 Cranch Cir. Ct. 305, and *Cline* v. *Bioy*, 1 Or. 90, the affidavits were refused, however.

In Ohio jurors' affidavits have been held admissible to a limited extent in exceptional cases, "where life or even liberty is threatened by misconduct of the jury:" *Farrer* v. *State*, 2 Warden's Ohio Rep. 54.

The practice of admitting them in Tennessee first received sanction in a capital case (*Crawford* v. *State*, 2 Yer. 60), in which it is probable the bias of the court was not a little *in favorem vitæ*, though the case received elaborate investigation, and was evidently well considered. Indeed, in the next case (*Booby* v. *State*, 4 Hun 111), the court say the case of Crawford was examined with much care, and as evidence of the wisdom of their decision, take manifest pleasure in saying that on the second trial Crawford was acquitted: Id. 116. In *Booby's Case* the new trial, though refused on the ground that a juror had bet on the verdict, was granted on the ground that a juror's affidavit disclosed that the verdict had resulted from statements made by a juror to the prejudice of the prisoner after the jury had retired; and the court places much stress upon the idea that this misconduct was in palpable violation of the constitutional provision, "that in all criminal prosecutions the accused hath a right * * * to meet the witnesses face to face." *Crawford's Case* was decided in 1821 and *Booby's* in 1833; and, thenceforward, so far as the reports show, though the practice of admitting juror's affidavits was uniform, it was allowed only in criminal cases, till 1872, when the court, in *Wade* v. *Ordway*, 1 Baxter 229, on elaborate consideration, extended it to civil cases; and ever since the affidavits of jurors have been held admissible to impeach their own verdicts, though, as the courts say, "they are to be received with great caution," because they tend to defeat solemn public acts, open a door to tamper with jurors after verdict, and permit a dissatisfied juror to destroy a verdict after he had once under oath assented to it. And in *Fish* v. *Cantrell*, 2 Heisk. 578, NICHOLSON, C. J., remarks: "It is time that circuit judges had ceased to allow the affidavits of jurors, as to the grounds of their verdicts, to be read on motions for new trials, *unless in extraordinary cases.*"

In *Mann* v. *State*, 3 Head 374, it is said that, "the circuit judges should cause the impeaching witnesses to be thoroughly examined in open court, instead of acting upon their prepared affidavits, though sworn to in open court. This would be the best and safest practice to avoid imposition." This remark was made in regard to an attempted impeachment of jurors *propter affectum*, but seems equally applicable to a case where the impeachment is for misconduct during trial. The singularity of the principal case consists in the fact that the verdict was set aside *without the affidavit or testimony of the jurors*, upon the *ex parte* affidavit of the plaintiff to a hearsay statement of what occurred in the jury room, which could probably have been proven only by the jurors. Defendant failed to produce and the court declined to call the jurors to contradict the hearsay charge of misconduct, and thereupon the affidavit was taken for confessed and the new trial awarded.

In *Drummond* v. *Leslie*, 5 Blatchf. 453, a new trial was refused which was sought on the affidavit of *third persons* as to what jurors had said impeaching their verdict. And in *Heath* v. *Conway*, 1 Bibb 398, a motion for process to bring in jurors, to testify of misconduct alleged against the jury, was denied, Judge BIBB remarking: "The court should be very cautious in collecting a jury after they are dismissed from their oaths, with intent to set aside their verdict, for 'no one knows whom they meet on the way.'" The power to recall them seems to be admitted, but on account of public policy it was refused.

Similar rulings were made in *Hollingsworth* v. *Duane*, Wall. Cir. Ct. 147, and *Holmead* v. *Corcoran*, 2 Cranch Cir. Ct. 119. But in *Howard* v. *Cobb*, 3 Day 309, the court declared that neither a juror nor the officer of the jury could be compelled to testify as to alleged misconduct of the jury in separating without leave of court before returning a verdict.

The only previous Tennessee case on this subject leaves this question open. In *Stone* v. *State*, 4 Hun 27, the prisoner had exhibited affidavits of third parties as to misconduct of the jury, and moved for compulsory process to bring in the jurors to testify in regard to it. On argument the motion was overruled; but the court heard statements made by the jurors voluntarily. This action of the circuit judge was neither criticised nor affirmed; but it was observed by TURLEY, J., that "if hearsay evidence of misconduct in jurors might be received to set aside a verdict, verdicts would, indeed, be worth but little;" and "a new trial never has been, and it may safely be predicted never will be, granted upon the reported observations of jurors as to their conduct during the trial." That was in 1843.

The decision that "it was in the legitimate power of the court to compel the attendance and deposition of each juror" seems peculiar and in conflict with the current of decision in other states, but is probably the natural and necessary result of the peculiar state of the law in Tennessee as to the admissibility of jurors' affidavits or testimony in impeachment of their own verdicts.

In other states, applications to compel jurors to give evidence to impeach their verdicts have been denied, because such evidence is not admissible. Yet if the fact of misconduct by the jury is satisfactorily shown by competent evidence, a new trial results. In this state the evidence of the juror is admissible to show the misconduct; and therefore the courts will aid the complaining party by process, if necessary, to procure this competent evidence as well as any other that will assist in the administration of justice.

The Code of Tennessee provides, sect. 3167, that "if the judgment or decree of the inferior court be reversed, the appellate court shall give such judgment or make such decree as should have been rendered in the inferior court;" and, sect. 3170, that "the court shall also, in all cases where, in its opinion, complete justice cannot be had by reason of some defect in the record * * * remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right." Why was this case not remanded with directions to the circuit judge to hear the evidence of the jurors, before acting on the motion for a new trial?

H. H. INGERSOLL.